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IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Continental National Bank, a corporation,	*Plaintiff in Error,*
vs.	
Mary Neville,	*Defendant in Error.*

Opening Brief on Behalf of Plaintiff in Error.

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Opening Brief on Behalf of Plaintiff in Error.

This is a writ of error to the District Court, for the Southern District of California, Southern Division, for the correction of errors occurring in the trial of the action, and in the rendition of the verdict of the jury, and the entry of judgment thereon.

The action was commenced by the defendant in error against the plaintiff in error, and one Fred Birdsall, for the recovery from the plaintiff in error of the amount claimed as a balance upon a certain bank account of the defendant in error with the plaintiff in error.

The plaintiff in error claimed that the account was a joint and several checking account, standing in the name of the defendant in error, and the said Fred W. Birdsall, and that all of the funds deposited in said account had been checked out, either by the checks of the said Fred W. Birdsall, or the defendant in error, excepting the sum of $9.85, which balance the plaintiff in error admitted and offered to pay.

The defendant in error, Mary Neville, claimed that as to four items of deposit, amounting to $3,500.00, the same were her separate property, and deposited in her individual name alone; that against these funds she had drawn checks aggregating $137.60, and no more, and that as to the balance amounting to $3,386.40, the same was not subject to be charged to the checks of the defendant Birdsall.

The jury returned a verdict in favor of the defendant in error, Mary Neville. The proceedings at the trial are up on a bill of exceptions.

STATEMENT OF FACTS.

The first deposit was made in the account September 21st, 1920, and the last entry in the account, October 6th, 1920, or a total lapsed period of sixteen days. During this period of time and for a few days thereafter, the defendant in error, Mary Neville and the defendant, Fred W. Birdsall, were living together as husband and wife, and as the defendant in error claims, in the belief so far as she was concerned, that she was

his wife. She went by the name of Mary Neville Birdsall.

Mary Neville became eighteen years of age on the 30th day of October, 1920, or a month and ten days after the first deposit was made, and less than a month after the last check was presented against the account.

The account in full is set forth in pages 60 to 62 of the transcript. The dates and amounts of the deposits in this account are as follows:

September 21st, 1920	$ 500.00
September 29th, 1920	400.00
October 2nd, 1920	2500.00
October 4th, 1920	500.00
October 4th, 1920	500.00
Total	$4400.00

All of the checks drawn against this account were signed either by Fred W. Birdsall or by Mary Neville alone. They are set out in the transcript at pages 35 to 43 and those signed by Mary Neville aggregated $113.60, and those signed by Fred W. Birdsall aggregated $4,276.45.

The history of the deposits of this account is as follows:

The first item of September 21st, 1920, $500.00, was a check of Mrs. Kate Neville in favor of Mary Neville Birdsall (the defendant in error) endorsed by Mary Neville. [See Tr. pp. 26 and 27.] The defendant in error testified that she endorsed this check and gave it to her supposed husband, Fred W. Birdsall, to de-

posit in the Continental National Bank for her. [See Tr. p. 26.]

The defendant Fred W. Birdsall took the check and presented it to the president of the Continental National Bank, the plaintiff in error, and requested that it be deposited to the joint and several credit of Fred W. Birdsall and Mary Neville Birdsall. [Testimony of Nichols, Tr. p. 63.]

The president, Mr. Nichols, thereupon prepared a deposit slip showing the deposit of $500.00 to the joint credit of Mary Neville Birdsall and Fred Birdsall. [Testimony of Nichols, Tr. p. 64.] The deposit slip, a part of Exhibit 12, is set out at page 50 of the transcript.

The president also prepared a signature card and took the signature of Fred Birdsall. A copy of this card is set out at page 29 of the transcript, being Exhibit 9b.

The president also prepared a customer's pass or deposit book, writing thereon as the name of the depositer, "Fred Birdsall or Mary Neville Birdsall." A copy of this book, Exhibit 7, is found at page 45, etc., of the transcript.

The president then delivered the deposit slip and the check to the bookkeeper, with directions to open an account according to the deposit slip, and the account was accordingly opened upon the books of the bank in the names of "Fred Birdsall or Mary Neville Birdsall." A copy of the account is set out in the transcript at page 60, Exhibit B. As originally entered upon the

books of the bank, it read "Fred Birdsall and Mary Neville Birdsall," but the word "and" was erased and the word "or" substituted to conform to the instructions. [See testimony of Mr. Nichols, Tr. p. 69. See also testimony of Mary Neville, Tr. pp. 73 and 74.]

A few days later Fred Birdsall brought the defendant in error, Mary Neville, to the bank and introduced her to the president, Mr. Nichols, and Mr. Nichols then prepared, and she signed, a signature card. There was no conversation about the account. [See testimony of Mary Neville, Tr. p. 28.] A copy of the signature card, Exhibit 9, is set out on page 28. [See also testimony of Mr. Nichols, Tr. p. 72.]

On September 29th, the note department, or note teller, of the bank, made out a deposit slip in favor of Fred Birdsall for $400.00; the item was credited to the account in question. [See testimony of Wolfe and copy of deposit slip, Tr. p. 58.] The plaintiff disclaimed any interest in this money. [See statement of counsel in open court, Tr. p. 74.]

The item of deposit of October 2nd, $2,500.00, was a check drawn in favor of Mary Neville, the defendant in error, as the price of an automobile. Mary Neville endorsed the check and gave it to her husband and went to the bank with him to make the deposit. [See testimony of Mary Neville, Tr. p. 29.] But the deposit slip was made out in the name of Mary Neville alone. A copy of the deposit slip is set out in the transcript at page 50. It was made out by the defendant Birdsall.

The president, Mr. Nichols, testified that he personally took this deposit and entered the same in the joint and several pass book. Mr. Birdsall presented the book with the check and the deposit slip for deposit. [See testimony of Mr. Nichols, Tr. p. 64.]

On October 4th, two deposits were made of $500.00 each. As to one of these deposits the deposit slip was made out in the name of Fred Birdsall. A copy of the deposit slip is set out at page 50 of the transcript. The plaintiff in error disclaimed at the trial, any interest in this money. [See statement of counsel in open court, Tr. p. 74.]

The other item deposited was a cashier's check in favor of Mary Neville Birdsall, duly endorsed by her. [See copy of check, Tr. p. 30.]

The defendant in error testified, at page 52:

"Q. By Mr. Dunnigan: Did you at any time speak to any teller or any officer in the bank or give them any direction as to any of these deposits you have testified about?

A. No, sir. I never made out a deposit slip. I do not think there was anything said by Mr. Birdsall in my presence at the bank, and in the presence of any teller, employe or officer of the bank respecting these deposits."

POINTS FOR REVERSAL.

Plaintiff in error will ask the court to reverse the judgment, for the following reasons, which will be hereafter discussed in their consecutive order.

I. That the evidence is insufficient to sustain a verdict for any amount in favor of the plaintiff in the court below, Mary Neville.

II. That the court erred in giving to the jury contradictory instructions in this: That the court in one part of the instructions instructed the jury that the possession of a negotiable check, duly endorsed by the defendant Fred Birdsall, entitled him to be treated by the bank as the owner thereof, and further instructed the jury that a deposit slip did not express the binding contract of the parties as to the nature or conditions of the deposit; and in another part of the instructions, the court instructed the jury that if the defendant Fred Birdsall presented to the bank a check drawn in favor of Mary Neville, together with a deposit slip containing the name of Mary Neville alone, and the money represented by the check was the separate property of Mary Neville, then the bank would necessarily be required to deposit the money to the credit of Mary Neville alone, irrespective of any other circumstance in the transaction.

III. The court erred in instructing the jury as fol lows:

"If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such

deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall."

I.

That the Evidence is Insufficient to Sustain a Verdict for Any Amount in Favor of the Plaintiff in the Court Below, Mary Neville.

As pointed out in the preceding statement of facts, the defendant in error, Mary Neville, never delivered to the bank any checks or money; never had any personal transaction with the bank respecting the account in question, except to sign and deliver a signature card.

The bank was not chargeable with notice that the money represented by the checks which were deposited, was the property of Mary Neville. The checks were negotiable in form and properly endorsed. (The authorities in support of this contention will be cited in the discussion of the third and last point of this brief, and are omitted here for the sake of brevity.)

The original deposit slip was joint and several. Yet the jury by their verdict included the amount represented by this deposit in the amount fixed in the verdict. As to the other deposit slips, they contained the name of Mary Neville alone.

The deposit slip was not the contract of the parties, and was merely *prima facie* evidence of the transaction. (The authorities in support of this will also be discussed under the third and last point of this brief, and are here omitted for the sake of brevity.)

In each instance, however, the joint and several deposit book which contained the names of both Mary Neville Birdsall and Fred Birdsall, was presented with the deposit, and entered upon the pass book.

This constituted in itself a representation or request by Fred Birdsall in making the deposit, that the money should be credited to that fund. The deposit slip in point of fact did not contradict the act of the bank in crediting the money to the joint and several account, because Mary Neville had the same right to check upon this account as did Fred Birdsall, and it was in truth and in fact, a credit in her name.

The two deposits, one of $400.00, and the other of $500.00, the title to which the defendant in error disclaimed at the trial, were presented with deposit slips in the name of Fred Birdsall alone, and credited to the same joint and several account.

The first was presented with a passbook and entered in the passbook, and the second was made out by the bank itself without the passbook, and credited to the same account, presumably alone, as the deposit slip itself shows that it was a bank item.

The fact that the signature cards were separate is explained by the circumstance that they were signed at different times. It is a matter of common knowledge that signature cards of customers are kept by the tellers who handle the funds, and not by the executive officers of the bank who do not handle such transactions.

Mr. Nichols, the president, testified that this was the only account on the books of the bank in which Mary Neville was interested.

"Q. I believe I asked you whether during the time this joint account was open, either of the parties had any other account with the bank?

A. Not to my knowledge." [Tr. p. 67.]

There could therefore be no confusion as to the crediting of these deposits as between two or more distinct accounts. It was a rule of the bank that nobody but its officers were authorized to open new accounts. Mr. Nichols testified at page 66 of the transcript:

"Q. Who in the bank has authority to accept new deposits, or had at that time?

A. The officers, I think, were all. The tellers were not permitted to open new accounts. I never heard of any other account with these people. I gave directions for the opening of that account."

It is a custom among banks in the locality where this transaction occurred, that deposit slips for deposits in joint and several accounts, may contain the name of either one or both of the joint depositors. Mr. Nichols upon this subject testified at page 66, *et cet.* of the transcript:

"I have been in the banking business over 16 years and in this city 13 years. I was cashier for the California Savings for 10 years and of the Continental for 3 years—or president of the Continental two years and a half.

Q. Are you able to state whether it was customary in all cases of joint accounts to have both signatures on the same card?

A. It is not.

Q. I will ask you whether or not it is customary on deposit slips to always put your names on a joint card or a joint slip?

A. It is not.

Q. What is the custom as to depositing—not in one bank alone, but is there a custom as to making deposits in joint accounts where the slip only contains one name of a depositor instead of both?

A. It will be credited in the joint account.

Q. Would the fact that there was or was not any other open account on the books of the bank have anything to do with that?

A. Well, if I understand you, if there was a joint account and another account, the other would likely be under the name of one as 'special,' or 'No. 2,' or some word to designate that it was an individual account otherwise there would be confusion in the books."

As a matter of fact the court instructed the jury that general custom would be binding upon the parties herein.

"The usage of banks in respect to the powers and duties of its officers so far as such usage is known to the business public enters into and qualifies the contracts made by such banks through their officers. Custom and usage, if reasonable, have a binding force between the bank and the customer." [Tr. p. 77.]

It therefore appears that there was nothing unusual on the part of the bank in crediting the deposits as it did credit them in this case.

There is not in the evidence, a scintilla to indicate that the bank had any notice of the intention of the defendant in error to have these moneys deposited to her separate account or credit.

Even though defendant in error was a minor, she was still competent to pass title to a negotiable instrument, and the court so instructed the jury. We quote the instruction which is also a quotation of section 3103 of the Civil Code of California.

> "Section 3103 provides:
> 'The endorsement or assignment of the instrument by an infant passes the property therein notwithstanding that from want of capacity the infant may incur no liability thereon.' "

The only possible suggestion of any evidence which would indicate a substantial conflict in the evidence are the following circumstances, which were suggested by defendant in error at the trial, and therefore mentioned here. These are as follows:

The plaintiff testified at page 26 of the transcript that she had instructed her supposed husband to deposit the first check in her name, and she testified that he afterwards showed her a passbook which did not contain his name, but did contain her name, showing the deposit of $500.00. [Tr. p. 27.]

She was shown the passbook which was issued, but could not say whether or not it was the one which she had originally seen. [Tr. p. 27.]

On the other hand, Mr. Nichols, the president, testified [Tr. p. 65] that this was the only passbook ever issued, and that both names were written upon the passbook at the time it was issued. [Tr. p. 65.]

The bank would not be bound by the presentation to Mary Neville by her husband of any fictitious passbook. Such testimony was mere hearsay so far as the plaintiff in error is concerned.

Another circumstance which might be suggestive, is that the bank had a stamp, sometimes used on signature cards, which read as follows:

"Joint owners subject to order of either, balance at the death of either belonging to the survivor."

Mr. Nichols testified that this was sometimes used upon the request of a customer, and sometimes not. That there was no rule upon the subject. [See Tr. p. 68.]

The final circumstance was that on the original account, the entry was first made "Mary Neville Birdsall and Fred Birdsall" and was changed to "Mary Neville Birdsall or Fred Birdsall." The president, Mr. Nichols, testified the difference between these two entries would mean that, according to the former method, both signatures would be required to a check, and if by the latter method, but one signature. He further testified that the direction which he gave was shown upon the orig-

inal deposit slip; that the word "or" was the one he directed to be used, and was in accordance with the request of Mr. Birdsall in opening the account. [See Tr. pp. 68 and 69.]

At the trial these circumstances were urged as evidence of the fact that the account was originally opened in the name of Mary Neville Birdsall alone, and that someone had changed the books of the bank. These circumstances were not sufficient in themselves to make a *prima facie* inference that any such thing had occurred, and they were completely overcome by the direct testimony in the case.

For these reasons, we earnestly submit, irrespective of all other considerations, the verdict should have been by the trial judge directed in favor of the plaintiff in error here, Continental National Bank.

II.

The Instructions Given by the Trial Court to the Jury Were Controdictoory.

The court instructed the jury, among other things:

"In receiving said deposit the defendant bank had a right to assume that any check presented to said bank for deposit was owned by the party presenting the check, provided the check was duly endorsed without limitation of the endorsement by the payee thereof and the bank had no information which would put them upon notice to the contrary." [Tr. pp. 80 and 81.]

In this instruction the court unmistakably told the jury that when the defendant Birdsall presented the

first two deposits in question, $500.00 September 21st, and $2500.00 October 2nd, that the bank had the right to treat the defendant Birdsall as the owner thereof, and it follows as a necessary consequence that if the bank had the right to treat Fred Birdsall as the owner of these two items, it had a right to deposit them in any manner that Birdsall should direct.

It matters not that there was evidence in the record from which the jury might have believed that the bank otherwise had notice of the different ownership of the money represented by these checks. They were still told that if they believed that the bank had no such notice, then the possession of a check by the defendant Fred Birdsall, even though payable to the defendant in error, Mary Neville Birdsall, yet if duly endorsed by her, was evidence that the same was owned by Fred Birdsall, in whose possession it was found. This is especially true in view of the fact that the court had instructed the jury that the defendant in error, though a minor, was competent to pass title to negotiable paper by delivery and endorsement.

Again the court instructed the jury:

"The deposit slip, however, may be controlled by other evidence; that is to say, the deposit slip is not conclusive as a direction to the bank as to whom the deposit shall be made. Oral directions may be given or other instructions may show that the party intended the deposit should be made in the name of some other party than that on the deposit slip." [Tr. pp. 82 and 83.]

In this instance there was evidence before the jury that both the check and the deposit slip and the passbook were in the joint names as to the item of $500.00 opening the account on September 21st. There was evidence before the jury that as to the second item of $2500.00, the deposit slip was in the name of Mary Neville Birdsall, but that there was presented with the deposit slip the passbook which was in the joint names; both were presented by Fred Birdsall, and the bank entered the item to the joint and several account.

Therefore, by these two instructions the jury were entitled to find for the bank as to these two particular items, if they believed that the checks, though payable to the defendant, Mary Neville, were endorsed by her, and delivered to the possession of her husband, and by him presented as the owner thereof to the bank, with instructions to enter in the joint and several account.

There was ample evidence to sustain all this, as in the one case both the check and the deposit slip were in the joint names, and in the second case, the check was unconditionally endorsed and delivered into the possession of Fred Birdsall, and he presented it with the joint and several passbook for deposit.

Notwithstanding these two instructions, the court further on in its instructions to the jury [Tr. p. 83] gave the following instruction:

"If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and *duly endorsed by her,* and at the same time that said check was presented for deposit, a deposit slip to the effect

that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall but should have credited it solely to Mary Neville Birdsall."

This instruction flatly and unconditionally contradicts the law as given to the jury in the two preceding portions of the instructions, as above quoted.

We take the liberty of deferring to a later portion of this brief a discussion of the question as to which of the above instructions was correct, but desire to confine our argument at this point to the fact that they were *contradictory*, and that this contradiction constituted reversible error.

In the portion of the instructions last above quoted, it is to be noted that there were only two propositions involved.

One, that the check presented, though properly endorsed, was only payable to Mary Neville Birdsall, and the other, that the deposit slip was made in the name of Mary Neville Birdsall alone. In the portion of the instructions first above quoted, the court had told the jury that the possession of the check, properly endorsed, was *prima facie* evidence of title in the possessor, and this applied as well to a check originally payable to the defendant in error as to any third person.

In the portion of the instructions to the jury second above quoted, the court had told the jury that the fact that the deposit slip was in the name of one party

alone, raised only a rebuttable presumption. The correct analysis of that portion of the instructions last above quoted, therefore, resolves itself into the proposition that a presumption in favor of the bank, taken in conjunction with a rebuttable presumption against the bank, raises a conclusive presumption against the bank.

It should be remembered as above noted, that there was evidence to overcome the rebuttable presumption stated by the court, arising from the nature of the deposit slip, and there was also evidence before the court (which we feel conclusive) that the bank was without any notice whatever to overcome the presumption in its favor growing out of the ostensible ownership by Fred Birdsall.

The giving of contradictory instructions is reversible error.

In the case of Hesler v. California Hospital Co., 178 Cal. 764, the court at page 768 said:

> "The court below in other instructions stated the rule by which the defendants were bound, accurately and clearly. There is a clear conflict in the instructions. We are unable to determine which set of rules the jury followed."

In the case of Pierce v. United Gas and Electric Co., 161 Cal. 176, the court said at page 184 *et cet.:*

> "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true, must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclu-

sion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state. (See Killelea v. California etc. Co., 140 Cal. 602 (74 Pac. 157).) * * * It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff."

In the case of Starr v. Los Angeles Ry. Corporation, 201 Pac. 599, the court at page 603 said:

"It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

In the case of Noce v. United Railroads, 200 Pac. 819, the court at page 822, said:

> "Where two instructions are contradictory in essential parts, the judgment must be reversed. Hayden v. Constantinople Mining & Dredging Co., 3 Cal. App. 136, 84 Pac. 422. See also, People v. Ross, 19 Cal. App. 469, 126 Pac. 375."

In the case of Sappenfield v. Main St. Etc. R. R. Co., 91 Cal. 48, the court at page 59 says:

> "The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict."

III.

The Court Erred in Instructing the Jury That the Presentation by Fred Birdsall of a Deposit Slip in the Name of Mary Neville Birdsall Alone, Together With the Fact That the Item was a Check Originally Drawn to Mary Neville Birdsall, Though Properly Endorsed, so Conclusive Upon the Bank.

The instruction complained of has been previously quoted, and is in the words following:

"If Fred Birdsall presented a check to the bank which was payable to Mary Neville Birdsall and duly endorsed by her, and at the same time that said check was presented for deposit, a deposit slip to the effect that said money should be deposited to Mary Neville Birdsall, then the bank had no right to credit such deposit to the joint and several account of Fred Birdsall and Mary Neville Birdsall, but should have credited it solely to Mary Neville Birdsall."

This instruction was tantamount to an instruction to return a verdict for the paintiff, as to all of the items in question except the deposit of September 21st, for $500.00, because in each case the item was a check drawn in favor of defendant in error, properly endorsed by her and presented for deposit by Fred W. Birdsall, together with a deposit slip containing the name of Mary Neville Birdsall.

It should be noted that the circumstances in the case at bar were not such that the bank in crediting the deposit contradicted in any way the terms of the deposit slip. This is not such a case as where a deposit slip in favor of A is by the bank for some reason credited to the account of B. The deposit, being made to the credit of A and B, is still a deposit to the credit of A. This deposit being put in the joint and several account, was a deposit to the credit of Mary Neville Birdsall, in accordance with the deposit slip, and the only objection that could be made to the transaction, was that the deposit slip did not contain the *entire contract*.

The instruction was erroneous for the following reasons:

(a) The fact that the item of deposit, a check, was originally payable to the order of Mary Neville Birdsall, did not raise any presumption of fact in favor of Mary Neville Birdsall. On the contrary, the fact that the check was unconditionally endorsed by her, and in the possession of the defendant Fred Birdsall, raised a presumption in favor of the bank that the item was Fred Birdsall's property;

(b) The instruction was tantamount to stating that the deposit slip was conclusive upon the bank, while on the contrary, the deposit slip was only *prima facie* evidence; and

(c) The instruction, in excluding from the consideration of the jury the facts

1st. That Fred Birdsall gave personal direction that the items in question be deposited to the joint and several account, and

2nd. That in connection with the deposit slip, the defendant Birdsall presented the joint and several passbook, for the purpose of having the deposit entered thereon;

both of which would overcome any presumption arising from the statements in the deposit slip.

We will separately present the authorities in support of these several propositions, as follows:

The first proposition we desire to discuss is that the possession by Fred Birdsall of the check of Mary

Neville Birdsall, unconditionally endorsed by her, was presumptively the property of Fred Birdsall.

The case of United States, Etc., v. the First National Bank, 18 Cal. App. 437, is very similar to the case at bar. The facts were that a check made payable to the order of "Henry Kenyon, guardian for Frank C. Kenyon," a minor, was presented by Henry Kenyon, the guardian, to the defendant bank. The bank had actual knowledge that the check was the property of the minor. The guardian requested that the proceeds of the check be deposited in the bank in his individual name, and were subsequently checked out or appropriated. The plaintiff was the bondsman for the guardian and was compelled to pay the money to reimburse the minor's estate for the misappropriation.

The bondsman brought the action to recover from the bank. A general demurrer was sustained to the complaint, and the judgment entered accordingly was affirmed. In deciding the case, the question as to the capacity of the plaintiff to sue under the circumstances was raised and was waived by the court in its decision, the case being decided as though the minor himself had been a party plaintiff. In deciding this case the court said, at page 440, *et cet.*

> "It is conceded that the bank upon presentation of the check duly indorsed might properly, and without cause for complaint, have paid the full amount thereof to Kenyon in cash. This being true, we conceive no reason preventing it with equal propriety from holding it at his request,

> either as a general or special deposit, subject to his order. * * * Appellant's contention, if accepted as applicable to the facts presented, would render banks *ex-officio* trustees in general for all *cestuis que* trust. In our opinion, the law does not impose such duties upon banks or other depositaries of trust funds. The complaint discloses no wrongful act in connection with the transaction on the part of the defendant, and there is no pretense that it was the recipient of any part of the fund embezzled by the guardian. It follows from what has been said that the court did not err in sustaining the demurrer upon the ground that the complaint failed to state facts essential to a cause of action."

The bank, the plaintiff in error here, having accepted the deposits in a specific way from Birdsall, was estopped from refusing to honor his checks on the account, in the absence of a claim by a second party. The defendant in error, Mary Neville, made no claim until after all checks had been honored and paid.

In the case of First National Bank, etc., v. Mason, 40 Am. Rep. 632, the court, at page 633, used the following language:

> "The bank held its claim against Thomas & Mason when the plaintiff made his deposits, and they knew, or at least they allege they knew when the deposits were made, that the money so deposited in plaintiff's name belonged to said firm. Yet under these circumstances and with this knowledge they permitted the plaintiff to make the deposit in his own name. Having received it as the money

of the plaintiff and given him credit therefor, the bank is estopped, in the absence of any notice from or claim by the real owner, from disputing the plaintiff's title. Having received the money as the money of the plaintiff, it is bound to pay it to him or upon his order. *Such a contract is implied from the fact of the deposit.*"

To the same general effect, see also Detroit Savings Bank v. Haynes, 87 N. W. 66, and the case of Sparrow v. Stake, etc., Bank, 77 S. W. 168.

The Deposit Slip at Best Raised a Rebuttable Presumption as to Whose Credit the Bank Should Deposit the Funds.

It is stated as a general proposition in 7 Corpus Juris, 639, section 321, as follows:

"A deposit slip is a mere acknowledgment by the bank that the amount named has been received."

Citing

Union Mills v. Clark, 134 N. Y. 368;
17 L. R. A. 580;
32 N. E. 38.

Fort v. Balisberg, etc. Bank, 64 S. E. 405:

"and does not purport to embody the contract between the parties."

Fort v. Balisberg etc. Bank, 64 S. E. 405:

"and cannot affect the rights of third parties under an alleged agreement with the depositor and the bank officers."

64 S. E. 405 above;

Morse, Sec. 290, page 547, 119 N. Y. S. 763;

Hastings v. Hugo Nat. Bank, 197 Pac. 460.

In American Life Ins. Co. v. Citizens State Bank, 168 Pac. 437 (L. R. A. 1918B 296), the court said:

"A deposit slip executed by a bank and delivered to a depositor, is not a written contract in which all oral negotiations and stipulations are merged, but is merely a receipt constituting *prima facie* evidence that the bank received the sum stated at that time which may be explained or contradicted by parol evidence. Tolcott v. Bank, 53 Kan. 480, 36 Pac. 1066; Bank v. Oak, 134 N. Y. 368, 17 L. R. A. 580, 3 R. C. L. 531 and 571."

In American National Bank v. Funk, 172 Pac. 1078, (L. R. A. 1918F 1137), the court said:

"A deposit slip issued by a bank is but *prima facie* evidence that the bank received the amount of the deposit on the date shown by the deposit slip. It has the same force and effect as that of any other form of receipt, and is open to explanation as to the conditions surrounding the deposit, and the circumstances under which it was given may be inquired into. Hugh v. First Nat. Bank of Oelwein, 155 N. W. 163; Keen v. Beckman, et al., 24 N. W. 270; First Nat. Bank v. Clarke, 134 N. Y. 368; Davis v. Lenawee County Savings Bank,

18 N. W. 629; Stair v. York Nat. Bank, 93 Am. Dec. 759."

Morse in his fifth edition on Banks and Banking, Sec. 690, page 547, says:

> "A deposit ticket may be controlled by parol. It is not a contract, but a memorandum or 'note to help the memory.' It is *prima facie* evidence of the bank's liability though the deposit is not credited on its books."

The Bank Book or Passbook was Prima Facie Evidence of Its Contents.

The fact that the entries of all of these deposits was in a joint and several passbook, raises a presumption that the money had been so deposited. This presumption is expressly strong as against the depositor because this book or evidence is the one that remains in the possession of the depositor, while the deposit slip remains in the possession of the bank.

Morse in his work on Banks and Banking, fifth edition, section 290, page 546, among other things says:

> "A bank book is *prima facie* evidence, but no more, and is open to explanation by parol evidence, or it is not a contract. As between the bank and its depositor, the entry of debits in the passbook and striking a balance are a statement of account, and the delivery of the book to the depositor and its retention by him without objection make it a stated account, and a retention for many months and drawing out the exact balance shown on the book afford clear evidence of a set-

tled as well as a stated account, and *prima facie* establishes the accuracy of the items.

If the depositor acts on faith of the account in a manner he would not have done but for faith in its correctness, the bank is bound, or if the depositor neglects to make such examination as a prudent man would make of his accounts, and the bank, acting in good faith or omitting to act by reason of his silence, puts itself in such position that correction would injure it, the depositor is bound."

The defendant in error does not claim in her evidence, to have ever seen the passbook in question but upon one occasion, and it is doubtful whether this was the passbook which was actually issued by the bank.

The defendant in error should be deemed to be estopped by her conduct in delivering negotiable checks to her supposed husband, permitting him to deposit the same in the bank, clothing him with the *indicia* of absolute ownership, and failing to recover possession of the bank book, examine it or look at it, while the parties were still living together as husband and wife.

The bank did not perform, and had no means of knowing of the secret claim of the defendant in error to these funds. If the funds were the exclusive property of the defendant in error, and she supposed them to be deposited in her name alone, she should at least have examined, if not taken possession, of the passbook, which she concedes she never did.

Even though the defendant in error were a minor at the time, she was within a month of her majority, and

her minority, while technically legal, was substantially passed, and if she had been married, as to all appearance she was and claims to have believed herself, she was *sui juris*. Yet, notwithstanding all this, she was in law competent to transfer title to negotiable paper, and there could have been under the circumstances no stronger evidence given by her of the fact that she had transferred title to the checks in question to her supposed husband.

The bank had no interest in these funds and derived no benefit therefrom. The only check against this account which the bank received for its own account, was one of nine hundred and some odd dollars, and nine hundred dollars of the money deposited to this account was conceded to be the money of Fred Birdsall.

As to the money claimed by the defendant in error, the bank acted strictly in its banking capacity, and had no interest in the money, and it would be inequitable and unjust by any construction of law or equity to make it the guardian of the defendant in error and the inquisitor of their domestic and private affairs, as between herself and her supposed husband.

In conclusion we respectfully submit that prejudicial error has been committed, and that on the whole case the plaintiff in error was entitled to pre-emptory instructions to the jury to find in its favor, and that the relief prayed for herein should be granted.

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